United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: September 20, 2007

TO : Joseph A. Barker, Regional Director
Region 13

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: The Levy Co.; Levy Indiana Slag Co.; and Edward C. Levy Co., as a single employer; and Staff Source, as joint employer
Case 13-CA-43109

524-5012-7400
524-5012-6000

This case was submitted to Advice as to whether a staffing agency unlawfully refused to consider and/or refer for employment Union-affiliated applicants. We conclude that there is insufficient evidence of anti-union motive to establish that the staffing agency's failure to consider or refer Union employees for employment was unlawful.

BACKGROUND

Staff Source is a staffing agency that refers employee applicants primarily to industrial positions with other employers in Northwest Indiana and Illinois, including the three Levy companies.[1] Its main facility is in Hammond, Indiana, though it established and operated an auxiliary facility in East Chicago from the fall of 2005 through spring of 2006.[2] The East Chicago facility was established for the specific purpose of providing temporary replacements to The Levy Co. while its employees were on strike,[3] and permanent replacement employees for LISCO and ECL.[4] Staff Source also occasionally recruits applicants from Work One, a state unemployment office.

---

[1] The "Levy companies" are comprised of The Levy Co., Edward C. Levy (ECL), and LISCO.

[2] All dates are in 2006 unless otherwise indicated.

[3] On March 27, the Levy Co. hired permanent employees.

[4] LISCO and ECL were hiring permanent employees because they had terminated the former Union-represented employees who engaged in a sympathy strike, in support of The Levy Co. strikers, in violation of the no-strike clauses contained

On November 29, 2005, and February 16, 2006, a total of approximately 77 Union-affiliated applicants appeared at the Staff Source offices to apply for work. Some of the applicants were on strike against The Levy Co., some of the applicants had been discharged from either ECL or LISCO, and some of them had no affiliation with any of the Levy companies but were clearly Union members. Staff Source did not refer most of these Union-affiliated applicants to jobs.

ACTION

We conclude that there is insufficient evidence of anti-union motive to establish that Staff Source's failure to consider or hire Union-affiliated applicants for employment was unlawful. To establish that an employer has unlawfully refused to consider an applicant for hire, the General Counsel must show (1) that the employer excluded applicants from a hiring process, and (2) that union animus, demonstrated through direct or indirect evidence,[5] contributed to the decision not to consider the applicant for employment.

Staff Source concedes that it excluded a majority of the Union-affiliated applicants from the hiring process. We conclude, however, that the evidence does not demonstrate that Staff Source refused to consider or refer the Union applicants based on union animus. First, there is no direct evidence of animus through statements or threats. Staff Source denies any unlawful motivation, and has proffered several facially reasonable explanations for its failure to consider or refer the Union applicants. Second, although Staff Source has offered some inconsistent explanations for its actions, none are so inexplicable or patently false as to provide indirect evidence of animus.

_____
in their respective extant collective bargaining agreements.

[5] In the absence of direct evidence of anti-Union motivation, the Board will infer an unlawful motive in the face of, for example, shifting and false explanations by an employer for its conduct. See Smucker Co., 341 NLRB 35, 40 (2004), enfd. 130 Fed. Appx. 596 (3d Cir. 1995) (when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for the conduct is not among those asserted), and cases cited therein.

For example, Staff Source claims it declined to consider and directly forwarded to Levy, without a thorough independent evaluation, the applications of all November 29 Union applicants at its East Chicago location after they arrived "en masse," purportedly acting in a disruptive and sometimes belligerent manner. Thus, Staff Source did not impede these employees' consideration for employment because Staff Source merely forwarded all the applications directly to Levy. By doing so, Staff Source allowed Levy to decide whether to consider and/or hire these applicants even though Staff Source itself did not view them as bona fide and seriously interested in obtaining employment.[6]

At its Hammond location, Staff Source acted pursuant to standard procedures, notwithstanding its view that the Union applicants were not bona fide, also due to their purported disruptive behavior. At Hammond, Staff Source instructed the Union members to return with completed applications or to apply via the internet. Staff Source then interviewed the mere three Union members who completed applications.[7] Finally, at its Work One location, Staff

---

[6] Indeed, Staff Source had no obligation to refer 18 of the 23 East Chicago Union applicants who were striking the Levy Company, as it is clear that the Levy Co. would have had no obligation to hire its own striking employees. Based upon the Region's conclusion that the three Levy companies are a single employer, Staff Source also had no obligation to refer any of the striking employees to ECL or LISCO. Although we have found no case addressing the obligations of an employer to hire the striking employees of another entity with whom it is a single employer, we conclude that the shared obligations and responsibilities of employers operating as a single integrated enterprise would extend to this situation as well. See, e.g., Pathology Institute, 320 NLRB 1050 (1996), enfd. mem. 116 F.3d 482 (9th Cir. 1997), cert. denied 522 U.S. 1028 (1997) (single employer required to recognize and bargain with union, and apply collective bargaining agreement of related entity); Teamsters Local 639 (Poole's Warehousing), 158 NLRB 1281 (1966)(secondary employer is not a "neutral" entitled to the protection of the Act if the primary and secondary are so closely integrated that they in essence constitute a single employer).

[7] Staff Source had no obligation to refer the 13 Hammond applicants who did not complete the application process. Two of the remaining three applicants were Levy strikers whom Staff Source had no obligation to refer to any of the Levy companies. Nor did Staff source have an obligation to refer them to its non-Levy clients, who did not have

Source inferred that the 38 Union applicants were not bona fide after five of them refused initial referrals to driver positions. Staff Source's conclusion that these Work One applicants were not serious about employment was not unreasonable after the first five refused bona fide offers of employment.

Further, we have examined certain inconsistencies in Staff Source's explanations and conclude that it would not be appropriate to infer animus from these alternative rationales. For example, in its June 30 position statement, Staff Source claimed that it forwarded the East Chicago applications pursuant to its standard procedures, and then later asserted that the Levy companies instructed it to forward applications because of the alleged disruptive deluge of Union applicants. Also, one of the three Hammond applicants contradicted Staff Source's claim that it offered him a laborer position. Finally, some Union applicants dispute Staff Source's claim that they acted in a disruptive manner when they arrived at each of the three Staff Source locations. These inconsistencies are not the types of shifting or false reasons from which, by themselves, we would infer animus, as they are not patently false and do not appear designed to intentionally evade the Employer's obligation to consider or refer applicants without regard to union status.[8]

In accordance with the above, the Region should dismiss the instant charge, absent withdrawal.

B.J.K.

---

positions at the applicants' requested rate of pay of approximately $25/hour.

[8] See University Moving & Storage Co., 350 NLRB No. 2, slip. op. at 4 (2007) (employer's initial reason for its action was erroneous, but there was no evidence that it was intentional and did not in itself establish animus). Compare Smucker Co., 341 NLRB at 40 (Board inferred animus based on employer's "patently false" reason proffered during the investigation for refusing to hire applicants, which shifted to another false reason after the General Counsel's presentation of its case at the hearing); Sound One Corp., 317 NLRB 854, 858 (1995), enfd. 104 F.3d 356 (2d Cir. 1996) (employer provided shifting reasons for an employee's layoff, first that the employee was no longer interested in doing his type of work (but that he was an efficient worker), and then that the employee was a poor employee).